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No. 91-1496

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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PETER C. REITER, ET AL., PETITIONERS

*v.*

LANGDON M. COOPER, TRUSTEE
for CAROLINA MOTOR EXPRESS, INC., ET AL.

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether, in an action by an insolvent motor carrier to collect undercharges based on the tariff rate, the shipper must pay the tariff rate prior to a determination by the Interstate Commerce Commission of the reasonableness and lawfulness of that rate, even though the motor carrier's insolvency precludes satisfaction of any subsequent reparations order.

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### INTEREST OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission (ICC or Commission) administers the Interstate Commerce Act (Act), 49 U.S.C. 10101, *et seq.* The United States is frequently a party to actions involving the application of the Act, 28 U.S.C. 2322, 2323, and has been a party in cases involving the issue in this case. *See, e.g., Rebel Motor Freight, Inc.* v. *ICC*, 933 F.2d 1009 (Table), cert. denied, 112 S. Ct. 617 (1991). Under the primary jurisdiction doctrine, it has long been recognized that courts must refer to the Commission issues arising under the Act that require

application of agency expertise or the explication of transportation policy. This case involves the application of that principle in the context of a lawsuit by a trustee for an insolvent motor carrier seeking to enforce the tariff rate against a shipper. The Fourth Circuit held that the filed rate doctrine prohibits a district court from staying the tariff collection action pending referral to the Commission for a decision on whether the tariff rate is unreasonable under the Act. Because the court of appeals' holding seriously misapplies the primary jurisdiction doctrine, interferes with the Commission's enforcement of the rate-reasonableness requirement of the Act, and threatens to burden shippers with unjustified charges, the United States and the Commission have a significant interest in the outcome of this case.

## STATEMENT

A. 1. Since 1935, the Commission has regulated interstate transportation by motor carriers. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543. A motor common carrier providing transportation subject to regulation under the Act must publish its rates in tariffs filed with the ICC. 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a).

The Act also requires that a carrier's rates and practices be reasonable. 49 U.S.C. 10701(a). If the ICC determines that a carrier is charging an unreasonable rate or is engaging in an unreasonable practice, the ICC "shall prescribe the rate * * * or practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1). A carrier is also liable for damages for imposing rates that the Commission finds to be unreasonable. 49 U.S.C. 11705(b)(3). The exclusive authority to declare a rate or practice to be unreasonable belongs to the ICC. 49 U.S.C. 11705(b)(3), 10704(b)(1); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440-441 (1907).



In a series of early cases under the Interstate Commerce Act, this Court developed the principles that later became known as the "filed rate" doctrine. Under that doctrine, when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain a defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate. See, *e.g.*, *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific Ry.* v. *Mugg*, 202 U.S. 242, 245 (1906); *Gulf, C. & S.F. Ry.* v. *Hefley*, 158 U.S. 98 (1895). As originally formulated, the primary purpose of the filed rate doctrine was to reinforce the statutory prohibition against rate discrimination. See *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922). In addition, by prohibiting courts from inquiring into the reasonableness of a tariff rate, the filed rate doctrine protects "the agency's primary jurisdiction over reasonableness of rates." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981); *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932).

2. In the Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793, Congress substantially revised the transportation policy of the United States to encourage a more competitive environment in the motor carrier industry. Among other things, the MCA significantly relaxed restrictions on entry into the motor carrier industry. 49 U.S.C. 10922. During the 1980s the number of licensed motor common carriers more than doubled.[1] The intensified competition, however, coupled with other economic factors, produced an increased number of motor carrier bankruptcies.

When a carrier goes into bankruptcy, its receiver or trustee typically retains an auditor to search the records of the carrier for instances in which the charges that the carrier billed and collected were lower than the applicable

[1] In 1980, there were approximately 17,000 regulated motor common carriers. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 2 (1980). In 1990, there were more than 44,000 such carriers. 1990 ICC Ann. Rep. 113, App. E, Table 1.

rates set forth in tariffs filed with the ICC. When discrepancies are found, the receiver or trustee files a collection action to recover the difference from the shipper. A significant number of carriers have filed such undercharge actions against shippers who relied upon the competitive rates that the carriers had offered, billed, and collected, but had not filed in tariffs as required by law. See *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

In response to those developments, the ICC formulated its *Negotiated Rates* policy, concluding that such solicitation and billing activities constituted an unreasonable practice, in violation of 49 U.S.C. 10701(a), when four defined criteria were met.[2] In *Maislin*, this Court held that the *Negotiated Rates* policy, by allowing the agreement of the parties to prevail over the tariff rate, "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular." 110 S. Ct. at 2768. The Court reaffirmed, however, that "[t]he filed rate doctrine * * * contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Id.* at 2767.

B. 1. Collection actions similar to those before this Court in *Maislin* continue to be brought. Thousands of shippers (including large corporations, small businesses, and individuals who received single shipments c.o.d.) are receiving rate rebillings, for claims ranging from less than $100 (for one-time shipments) to as much as $8 million for shippers that were regular customers of the now-defunct carriers. Many shippers have contended that the tariff rates asserted by the bankrupt motor carriers and their collection agents are in violation of the Act's requirement of reasonable rates, and have requested

[2] See *National Indus. Transp. League—Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).



courts to refer the rate-reasonableness issue to the ICC for determination, prior to adjudicating the undercharge claim.[3] The bankrupt motor carriers and their collection agents, however, have objected to referral and have claimed that the filed rate doctrine requires shippers to pay the tariff rate first and then initiate a separate reparations action to determine the reasonableness of that rate.[4]

The ICC addressed those issues in *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61 (1991). The ICC noted that in *Maislin*, this Court stated that when the ICC finds that a rate is unreasonable, the filed rate is "not enforceable." 8 I.C.C.2d at 66. The ICC further noted that the Commission alone has jurisdiction to determine whether a carrier's rate is unreasonable. *Id.* at 67. The Commission then analyzed the issue of whether the filed rate doctrine bars referral to the ICC of the rate-reasonableness issue and requires shippers to pay the tariff rate first and seek reparations later. Noting that "most of the carriers now bringing undercharge actions are bankrupt, and

[3] Referrals to the ICC have also been sought to address claims that the filed rates are unlawful for other reasons, such as failure to comply with statutory requirements governing the extension of credit, see *Delta Traffic Serv., Inc.* v. *Mennen Co.*, 730 F. Supp. 1309 (D.N.J. 1990), aff'd, 919 F.2d 134 (3d Cir. 1990) (Table), or failure to satisfy publication requirements, see *ICC* v. *Transcon Lines*, No. CV-91-5036 (C.D. Cal. Nov. 27, 1991), aff'd in part and rev'd in part, No. 92-55036 (9th Cir. June 17, 1992).

[4] The ICC is aware of at least 186 motor carriers that have filed claims against shippers based on the existence of higher tariff rates than the unfiled rates that were negotiated. The difference between the two is often substantial. Nearly 200 rate-unreasonableness cases are pending before the ICC, involving an estimated $10 million in undercharges. The Chairman of the ICC advised Congress that published estimates of undercharge liability in cases where the tariff did not reflect the rate originally billed range from $200 million to as much as $1 billion. *ICC Freight Motor Carrier Oversight: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 5 (1991).

shippers in all likelihood would not be able to collect from them reparations ordered," the Commission concluded that "[w]here the motor carrier is insolvent and hence unable to satisfy any subsequent reparation order, enforcement of the filed tariff without referral to the ICC would undermine the meaningful exercise of our unreasonable-rate jurisdiction and would deny the shipper an adequate remedy." *Ibid.* The ICC further explained that the carrier is not justified in insisting on immediate payment when it cannot pay reimbursement if the rate is found to be unreasonable. *Ibid.*

The Commission then determined that the filed rate doctrine does not require payment prior to referral to the ICC. The primary purpose of the filed rate doctrine is to prevent rate discrimination accomplished through unpublished rebates, but that purpose would not be served by denying referral to the ICC, because "[t]here is no possibility of a defunct carrier unlawfully discriminating for or against any shippers while the rate reasonableness challenge is being resolved." 8 I.C.C.2d at 68. Moreover, while it is a purpose of the filed rate doctrine to enable prompt collection of charges in order to maintain "a stable transportation system," that purpose is not furthered when the "carrier is no longer operating." *Ibid.* The Commission also rejected the claim that the Act has been interpreted to require "separate, sequential litigation" of the rate-reasonableness issue. *Id.* at 68-72. Based on a review of relevant decisions, the Commission stated that "courts have frequently referred rate reasonableness issues (or given effect to ICC rate reasonableness rulings) prior to the payment by the shipper." *Id.* at 70. In light of the accepted practice of referral "prior to payment of the filed rate," the Commission found ample support for the view that "referral is permitted under a normal, unstrained reading of the statute." *Ibid.*[5]

[5] The Commission also outlined the criteria it generally applies to claims that a rate is unreasonable, noting that "[a]lthough there is no single fixed test," factors traced in past decisions include "(a) relevant rate comparisons, (b) a carrier's proffer of a particular rate, (c) whether the rate would have moved the traffic had it been assessed at the time the shipment took place, (d) the class rates for like traffic, and (e) tariff analysis." 8 I.C.C.2d at 74. After elaborating on those factors, the ICC concluded that issuance of a formal policy statement would not be appropriate because the general standards for finding a rate to be unreasonable are marked out by the case law, and development of those standards is primarily a matter of application to particular factual records. *Id.* at 79.



C. 1. Prior to its bankruptcy, Carolina Motor Express, Inc. (Carolina) operated as a certificated motor common carrier subject to ICC regulation. Petitioners California Consolidated Enterprises, Inc. (CCE) and Peter C. Reiter (Reiter) are both brokers of motor carrier transportation; that is, they arrange transportation by motor carriers for the shipping public. Carolina agreed to supply transportation services to petitioners at particular rates. Petitioners believed that Carolina would publish the quoted rates in its tariffs on file with the ICC. Carolina thereafter provided the services, and billed and collected at the agreed rates, but failed to file the negotiated rates in its ICC tariffs. Pet. App. 29a-32a, 91a-98a.

After Carolina's bankruptcy, respondent Langdon M. Cooper was appointed trustee for the estate. The estate hired respondent Mark & Associates to audit Carolina's freight bills. The auditor determined that the difference between the rates Carolina had originally charged petitioners and the rates that Carolina had on file with the ICC totaled $58,793.03 for CCE and $13,795.73 for Reiter, and submitted bills in those amounts. Pet. App. 31a, 33a-34a, 58a, 65a.

2. After petitioners refused to pay the additional charges, respondents instituted collection actions in the United States Bankruptcy Court for the Western District of North Carolina. Petitioners answered that the rates sought to be collected were unreasonable and unlawful, that collecting higher charges than those agreed upon constituted an unreasonable practice in violation of 49

U.S.C. 10701, and that the rates sought did not apply to the traffic at issue. Pet. App. 25a-26a, 56a-57a, 90a. Both petitioners also moved for referral of the cases to the ICC. *Id.* at 27a, 58a.

The bankruptcy judge denied the motions for referral on the basis of his interpretation of the filed rate doctrine. Instead, finding no factual dispute, the judge entered final judgment in favor of respondents. Pet. App. 86a-140a. The district court, sitting in review of the bankruptcy judge's decision, reversed. Relying on the ICC's *Negotiated Rates* policy statement, the district court stayed the collection actions and referred the cases to the ICC. Pet. App. 76a-85a.

3. Respondents appealed the district court's referral order to the court of appeals, which held the appeal in abeyance pending this Court's consideration of the *Negotiated Rates* issue in *Maislin*. Following *Maislin*'s invalidation of the *Negotiated Rates* policy, the court of appeals vacated the district court's referral orders. Pet. App. 6a. The court went on to address petitioners' claim that the cases should be remanded with instructions to refer them to the ICC for a determination of whether Carolina's tariff rates were unreasonable. After concluding that petitioners had properly preserved that claim, the court, by a 2-1 vote, held that the filed rate doctrine precludes referral. *Id.* at 6a-7a, 12a.

The court interpreted the filed rate doctrine to require shippers to pay the filed rate first and seek reparations later. Pet. App. 7a. If shippers could obtain automatic referral to the ICC, the court said, it would provide a strong incentive to raise reasonableness defenses routinely in order to delay payment of the filed rate. That result, the court concluded, is "wholly inconsistent" with the filed rate doctrine, which entitles carriers to receive payment of the filed rate immediately when due. *Id.* at 7a-8a. Moreover, the court reasoned that shippers are charged with knowledge of the tariff rate, and should not wait until sued by trustees to challenge its reasonableness. If they do wait, however, they may file a reparations action.[6] *Id.* at 8a-9a. The court of appeals believed that its decision accorded with this Court's "longstanding insistence" upon "strict adherence" to the filed rate, which was of "considerable importance" in the "prevention of the secret and discriminatory negotiated freight rates which were the plague of common carriers in times past." *Id.* at 9a.



Judge Hall dissented, stating that the rate-reasonableness issue should have been referred to the ICC as a matter within the primary jurisdiction of the Commission. Pet. App. 11a-16a. Relying on the analysis in *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-107 (1st Cir. 1990), Judge Hall noted that courts have historically referred such issues to the ICC. Pet. App. 13a. He also disagreed with the majority's suggestion that permitting referral would encourage routine challenges that would delay payment, because the law provides sanctions against frivolous filings and because courts can require shippers to make a threshold showing of unreasonableness before referral. *Id.* at 14a. Finally, the dissent expressed concern that, because of a carrier's bankruptcy, shippers frequently will be unable to obtain an adequate remedy if they must pay the filed rate first and are relegated to a later reparations action. *Id.* at 14a-15a.

## SUMMARY OF ARGUMENT

A. The primary jurisdiction doctrine requires challenges to the unreasonableness of a carrier's rates or

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[6] See 49 U.S.C. 11705(b)(3). Under that provision, a shipper must file a claim in court, whereupon the court refers to the Commission the issue of reasonableness. See *Informal Procedure for Determining Motor Carrier and Freight Fowarder Reparation*, 335 I.C.C. 403, 412-413 (1969). The court of appeals recognized that, because the carrier in this case is in bankruptcy, a reparations remedy is likely to result only in the shipper's being "paid a pro rata share of his claim along with the carrier's other unsecured creditors," but nevertheless found that the Bankruptcy Code provides "adequate relief" for a shipper. Pet. App. 10a n.4.

practices to be adjudicated by the Interstate Commerce Commission. When an issue that comes under the primary jurisdiction of the ICC arises in a court action, it is appropriate for the court to stay its proceedings and refer the matter to the ICC. Those principles have led this Court and others to conclude that when a challenge to the reasonableness of a carrier's tariff rates arises during an undercharge action, it is appropriate to stay judicial proceedings and to refer the unreasonableness claim to the ICC.

B. The filed rate doctrine does not bar referral to the ICC of a rate-unreasonableness defense in the present context. The filed rate doctrine holds that neither the shipper's ignorance of the tariff nor the negotiations of the parties can prevail over the filed rate. As this Court reaffirmed in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759, 2767 (1990), however, the filed rate doctrine is subject to a critical caveat: when the ICC finds that the tariff rate is unreasonable, that rate is "not enforceable." That rule is necessary to harmonize the filed rate doctrine with the co-equal statutory requirement that a carrier's rates must be reasonable.

That caveat to the filed rate doctrine provides the governing principle here. Referral to the ICC of a rate-unreasonableness claim is not incompatible with the filed rate doctrine because that doctrine has always recognized that the ICC has power to declare a filed rate to be unreasonable and therefore unenforceable. No provision of the Interstate Commerce Act prohibits a court from staying an undercharge action pending a referral to the ICC for a ruling on the reasonableness of the rates. Nor are the purposes of the doctrine—to prevent discrimination and to assist a carrier in collecting its charges—furthered by a rigid prohibition against referral to the Commission in the present context. Finally, this Court's decisions do not prescribe a rule that invariably requires shippers to pay the tariff rate first, and seek reparations later.

To interpret the filed rate doctrine to erect a per se barrier to referral would defeat the goals of the Act when



the carrier is enmeshed in bankruptcy proceedings. The defunct carrier suffers no prejudice from a stay of the collection action and referral to the ICC. On the other hand, without a prior referral, the shipper would lack an adequate remedy for a claim of unreasonableness, because a subsequent reparations proceeding against a bankrupt carrier offers no realistic promise of relief.

Judicial action that has an impact on ICC-regulated rates should be structured to preserve the agency's primary jurisdiction and to protect parties unable to benefit from a subsequent reparations proceeding. *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982). Moreover, it is the ICC that has primacy in determining the remedies that are appropriate for a carrier's violation of the requirement of reasonable rates. Here, those principles strongly suggest that courts should not blindly enforce the tariff rate without prior referral of a rate-unreasonableness defense to the ICC.

C. The court of appeals interpreted the filed rate doctrine to prescribe a strict bar against referral to the ICC of a rate-unreasonableness defense. Because that holding is erroneous, and because referral is appropriate and justified when the shipper makes a threshold showing of unreasonableness in defense of an undercharge action by a bankrupt carrier, the case should be remanded for further proceedings.

## ARGUMENT

### THE COURT OF APPEALS ERRED IN REFUSING TO REFER TO THE ICC THE SHIPPERS' CLAIM THAT THE TARIFF RATE IS UNREASONABLE

#### A. The Primary Jurisdiction Doctrine Supports Referral To The ICC Of A Claim That A Tariff Rate Is Unreasonable

The primary jurisdiction doctrine requires that "[w]henever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern*

*Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The doctrine protects the uniform development of policy by the ICC and ensures the application of agency expertise to questions requiring familiarity with the regulated industry. *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 255-259 (1913); *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 580 (1966); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976). The doctrine has particular force with respect to a claim that a carrier's rates are unreasonable, because a key purpose of the Interstate Commerce Act is to provide for centralized administration in the ICC of regulation of the reasonableness of rates. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440-441 (1907); *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 196 (1913).

Drawing on those principles, courts have frequently referred rate-reasonableness issues to the ICC prior to enforcing the tariff rate against shippers in collection actions. For example, in *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956), carriers sued the shipper (the United States) in the Court of Claims for additional charges under the carriers' filed tariffs. The United States defended by arguing that the tariff asserted did not apply, and that "if this tariff item was held to govern, the tariff would be unreasonable as applied to these shipments." *Id.* at 61. The government also asked the court to stay proceedings and to refer its defense to the ICC. *Id.* at 61-62. This Court agreed, holding that under the primary jurisdiction doctrine, both the construction of the tariff and the question of its reasonableness were matters that should be referred to the Commission in light of the particular facts. *Id.* at 65-70. The Court rejected the carriers' argument that referral of the government's defense was prohibited because the applicable two-year statute of limitations barred the government from affirmatively seeking reparations for unreasonable rates. *Id.* at 70-74. The Court explained that "[o]nly the clearest



congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit." *Id.* at 71.[7]

Later decisions follow the same course. In *Pennsylvania R.R.* v. *United States*, 363 U.S. 202 (1960), a railroad sued the United States to recover additional charges, and the government challenged the reasonableness of the rates. This Court stated that the district court had "[p]roperly rel[ied] on our holding in *United States* v. *Western Pacific R. Co.*" in "suspend[ing] proceedings to enable the parties to have the [ICC] pass on the reasonableness of the rates." 363 U.S. at 203. Similarly, in *Chicago, Rock Island & Pac. R.R.* v. *Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385, 386-389 (8th Cir. 1970), a railroad sued for additional unpaid freight charges and the shippers claimed the rates were unreasonable. The court of appeals held that the district court was required to stay its hand until the ICC had reached

[7] Respondents argue that *Western Pacific* is inapplicable in this case because the government (unlike private shippers) need not abide by the filed tariff rate. Br. in Opp. 8-9, citing former 49 U.S.C. 66 (1976) (recodified at 31 U.S.C. 3726). Although the government does enjoy the unique right to set off claimed overcharges against subsequent bills and to raise estoppel defenses, see 352 U.S. at 74, 76 & n.20, the Court's reasons for requiring referral in *Western Pacific*—to secure agency expertise and to avoid the unfairness of allowing the carrier to collect potentially unreasonable rates with impunity—are equally applicable to private shippers in the present context. Indeed, relying on *Western Pacific*, courts have regularly stayed undercharge actions and referred rate-unreasonableness claims to the ICC at the behest of private shippers. See pp. 13-15, *infra*. Respondents also claim that *Western Pacific* is distinguishable because it involved a "technical" issue of tariff application. Br. in Opp. 9. *Western Pacific* did raise both a tariff construction and an unreasonable-rate issue, but the Court made clear that it was precisely *because* the tariff-construction issue raised complex issues akin to determining the reasonableness of a rate (*i.e.*, the analysis of costs underlying particular shipments) that the primary jurisdiction doctrine required referral of *both* issues to the ICC. 352 U.S. at 65-70.

a final decision. "The issue is the reasonableness of the railroad rate involved, and so far as we know every court holds that this is a subject for initial determination by the Commission." *Id.* at 387. See also *Union Pacific R.R.* v. *Bay Area Shippers Consolidating Ass'n*, 594 F.2d 1291, 1294-1295 (9th Cir. 1979) (per curiam) (railroad sought additional freight charges in district court litigation; court of appeals held that the lower court was required to refer to Commission the issue of whether the rate was reasonable); *Western Transp. Co.* v. *Wilson & Co.*, 682 F.2d 1227, 1231-1232 (7th Cir. 1982) (requiring referral to Commission of a defense in an undercharge case that a tariff's notation requirement was unreasonable).[8]

In cases following this Court's decision in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), the courts of appeals, with the sole exception of the court below, have similarly required referral. In *Maislin*, this Court rejected the ICC's *Negotiated Rates* policy, but confirmed that the filed rate is "not enforceable" when the ICC finds that the tariff rate is unreasonable; the Court then noted that "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." 110 S. Ct. at 2767 & n.10. In keeping with that statement, and the requirements of the primary jurisdiction doctrine, the majority of the courts of appeals that have addressed the issue have referred rate-unreasonableness issues to the ICC in undercharge cases brought by defunct carriers. *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-107 (1st Cir. 1990); *Advance United Expressways, Inc.* v. *Eastman Kodak*

[8] Likewise, the Commission has acknowledged its authority to decide the issue of the reasonableness of a rate when the matter is raised in defense to a court action. *Glama Dress Co.* v. *Mid-South Transp., Inc.*, 335 I.C.C. 586, 588-590 (1969) (Commission determined it had authority to decide rate-reasonableness issue when complainant had filed a counterclaim in pending court collection action raising issues of reasonableness and lawfulness of the rates).



*Co.*, No. 91-1320 (5th Cir. June 26, 1992);[9] *Orr* v. *ICC*, 912 F.2d 119, 122 (6th Cir. 1990); *Atlantis Express, Inc.* v. *Standard Transp. Serv., Inc.*, 955 F.2d 529, 535-538 (8th Cir. 1992);[10] see *Duffy* v. *BMC Indus., Inc.*, 938 F.2d 353, 357 (2d Cir. 1991) (referring rate-unreasonableness defense to the ICC, and staying undercharge action, when the statute of limitations would preclude assertion by shipper of affirmative reparations claim); *Delta Traffic Serv., Inc.* v. *Georgia-Pacific Corp.*, 936 F.2d 64, 66 (2d Cir. 1991) (declining to refer unreasonableness defense when it was not raised in district court, but directing the lower court to stay proceedings pending ICC's determination of reparations claim).

Those decisions are consistent with this Court's long-standing exposition of the primary jurisdiction doctrine. They represent an appropriate way to permit the Commission to enforce the basic requirement of the Act that a carrier's tariff rates must be reasonable and that an

[9] In *Advance United*, the Fifth Circuit held that "shippers may assert rate unreasonableness as a defense in an action by a carrier for undercharges and that district courts should refer issues pertaining to rate unreasonableness in such cases to the [ICC]." Slip op. 1. The court explained that "the primary jurisdiction doctrine mandates that the defense of unreasonableness initially be committed, according to the usual procedures under 28 U.S.C. § 1336(b), to the ICC for its review and decision." *Id.* at 12. In light of *Maislin*, the court expressly disavowed its prior suggestion in *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 497 U.S. 1010 (1990), that the filed rate doctrine bars the stay of an undercharge action for referral of a rate-unreasonableness defense to the ICC. Slip op. 8-9. The court of appeals in the present case had expressly relied on the former approach of the Fifth Circuit reflected in the *Caravan* decision. Pet. App. 8a.

[10] In *Atlantis Express*, the Eighth Circuit held that referral is required when "the parties agreed to a negotiated rate and the shipper (or broker) no longer has an adequate reparations remedy [for rate unreasonableness] at the time it is billed for the undercharges." 955 F.2d at 536. The court reserved whether rate unreasonableness is generally available as a defense in other cases. *Ibid.*

unreasonable rate is "not enforceable." *Maislin*, 110 S. St. at 2767. Contrary to the concern voiced by the court of appeals in this case, Pet. App. 7a-8a, courts have not referred cases to the ICC when the claim of unreasonableness is not backed by an adequate preliminary showing.[11] Rather, the courts have ordered cases referred when necessary to protect the shippers' rights in the event that the ICC should determine that the carrier is seeking to collect an unreasonable or unlawful tariff rate.

### B. The Filed Rate Doctrine Does Not Preclude Referral To The ICC Of A Rate-Unreasonableness Challenge

In refusing to refer the rate-unreasonableness defense to the ICC, the court of appeals invoked the filed rate doctrine. That doctrine, however, does not compel a court to enforce a tariff rate without a referral to the Commission for a prior determination of whether the rate is unreasonable. When the carrier will not be prejudiced by a stay, and when there is no adequate opportunity for the shipper to make its claim in later reparations proceedings, referral is fully compatible with the filed rate doctrine. Those are the circumstances here.

1. The filed rate doctrine requires carriers to collect, and shippers to pay, the rates contained in filed ICC tariffs. Under that doctrine, it is not a defense that the shipper was ignorant of the rate, that the carrier misquoted it, or that the parties agreed to a different rate. *Maislin*, 110 S. Ct. at 2766; *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922). The doctrine pro-

[11] See *Atlantis Express*, 955 F.2d at 537 ("to justify referral, parties must make a threshold showing that the ICC could find the filed rates unreasonable"); *Transtop, Inc.*, 902 F.2d at 106 (that negotiated rates were "significantly lower" than the filed rates raised a "sufficient possibility" that ICC might find the filed rates unreasonable to justify referral); cf. *Branch Motor Express Co.* v. *Caloric Corp.*, 914 F.2d 241 (3d Cir. 1990) (Table) (refusing to refer when the claim of unreasonableness was entirely unsupported).



motes stability, uniformity, and nondiscrimination in the rates governing regulated transportation services. But it has always been recognized that "[t]he filed rate doctrine * * * contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767, citing *Maxwell*, 237 U.S. at 97.[12] In *Maxwell*'s "classic statement" of the filed rate doctrine, *Maislin*, 110 S. Ct. at 2766, this Court declared that the filed rate applies "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. Similarly, Justice Brandeis observed for the Court in *Keogh* v. *Chicago & N.W. Ry.*, *supra*, that the tariff rate governs shippers' and carriers' rights "[u]nless and until suspended or set aside" by the ICC. 260 U.S. at 163.

That basic principle is directly implicated in this case. Petitioners have been sued for charges under a tariff whose rates are challenged as unreasonable. It is universally recognized that the ICC alone is empowered to adjudicate the reasonableness and lawfulness of those tariff charges. The claim that the rates are unreasonable, if valid, would foreclose enforcement of the tariff rate. *See Maislin*, 110 S. Ct. at 2767; *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 521 (1939). Because the filed rate doctrine is qualified by the statutory requirement of rate reasonableness, and because the ICC has exclusive power to address that issue, referral to the ICC is not barred by the filed rate doctrine.

[12] The Court in *Maislin* unanimously subscribed to that principle. See 110 S. Ct. at 2767 (opinion of the Court); *id.* at 2772 (Scalia, J., concurring) (acknowledging "an implicit but unexpressed exception to the filed-rate requirement" in order "to reconcile two textual provisions that would otherwise be categorically inconsistent (do not charge unreasonable rates, but charge whatever rates you have filed)"); *id.* at 2773 (Stevens, J., dissenting) ("From the beginning, * * * the Court construed that command [to charge filed rates] as subject to the unstated exception that a filed rate would not be enforced if the [ICC] determined that the rates were 'unreasonable.'").

The filed rate doctrine is not an independent legal construct, with applications that range beyond the provisions of the statute it implements. Rather, the doctrine exists to give meaning to the Act's specific requirements—particularly the provision that carriers may not charge or collect a rate that is not on file with the ICC. 49 U.S.C. 10761(a). No provision of the Act, however, prohibits a court from staying an undercharge action pending referral to the ICC of the issue of reasonableness.[13] To the contrary, in certain cases it would effectively abrogate the rate-reasonableness requirement of the Act to prohibit referral to the ICC. See *United States* v. *Western Pacific R.R.*, *supra*.

Nor would it serve the purposes of the filed rate doctrine to interpret it as a per se bar to referral. The fundamental goal of the filed rate doctrine is to prevent discrimination between shippers. Yet that goal is not impaired when it is the *Commission* that finds a rate to be unreasonable and therefore unenforceable. See *Texas & Pacific Ry.* v. *Abilene Cotton*, 204 U.S. at 441-442. Petitioners will ultimately have to pay whatever rates are found to be both applicable and reasonable by the ICC, which is the same requirement that applies to all other shippers that employed Carolina's transportation services.

The filed rate doctrine also serves the purpose of aiding a carrier in timely collection of its published charges; the rule thereby assists the carrier in maintaining financial solvency and contributes to a stable transportation system.

[13] For that reason, the issue in this case is quite distinct from the issue addressed in *Maislin*. In that case, this Court held that the filed rate doctrine prohibits an "unreasonable practice" defense based on the rate negotiated by the parties in view of the Court's conclusion that such a defense contradicted specific provisions of the statute 110 S. Ct. at 2767, citing 49 U.S.C. 10761, 10762, 10741, and 10701. It is indisputable, however, that the ICC can declare a rate to be unreasonable under its express statutory powers, see 49 U.S.C. 10701, and Congress has long recognized that courts may implement the primary jurisdiction doctrine by referring claims to the Commission. 28 U.S.C. 1336(b).



See *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520-521. That purpose has relevance when the carrier continues to operate. But when a carrier is in bankruptcy and has ceased operations, immediate payment is not necessary to preserve its operating capital. There is no justification, therefore, for frustrating the ICC's enforcement of the reasonableness requirement of the Act.[14]

2. This Court's decisions do not require rigid adherence to a requirement that shippers must pay the tariff rate first, and then seek reparations for the tariff's unreasonableness in a separate proceeding. Contrary to respondents' contention (Br. in Opp. 10, 13-14), this Court's rulings in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932), and *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913), did not involve the issue of whether referral to the ICC of an unreasonableness defense is compatible with the filed rate doctrine. Moreover, the decision in *Crancer* v. *Lowden*, 315 U.S. 631, 635-636 (1942), supports, rather than undercuts, the existence of discretion in the district court to order such referrals.

In *Arizona Grocery*, the issue was whether the Commission could "award reparations with respect to shipments which moved under rates approved or prescribed by it." 284 U.S. at 381. In the course of holding that the Commission could not do so, the Court stated that "the legal [tariff] rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. * * *

[14] The court of appeals also based its holding on a concern that if shippers could obtain automatic referral, they would routinely raise reasonableness defenses in order to delay payment of the filed rate. That concern has not materialized, see note 11, *supra*, and there is no reason to doubt that district courts will weed out insubstantial or pretextual claims. In any event, the possibility of some improper claims does not outweigh the certainty that absent referral, shippers that have been charged unreasonable or otherwise unlawful rates will be denied a meaningful remedy. See p. 22, *infra*.

[T]he shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation." 284 U.S. at 384. The essential point of that statement is that the *Commission* has exclusive power to determine the reasonableness of the rate; "only the enforcement of the award [is] relegated to the courts." *Id.* at 385. The Court did not comprehensively describe the procedural steps a shipper could take to challenge a rate as unreasonable when sued for undercharges.

Respondents' reliance on *Pennsylvania R.R.* v. *International Coal Mining Co.*, *supra*, is also misplaced. There, the issue was whether the shipper could recover damages after paying the tariff rate when the carrier had granted discriminatory rebates to other shippers. The Court rejected that assertion. It also rejected the claim that the carrier could unilaterally conclude that its rates were too high and grant rebates, stating: "If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation." 230 U.S. at 197. That a carrier may not declare its own tariffs unreasonable and grant rebates does not imply that a court is precluded from referring to the ICC the issue of whether a tariff rate is reasonable when that issue arises in litigation.[15]

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[15] The statements in this Court's cases indicating that the shipper must pay first and seek reparations later must be understood in light of the background principle that disputes over the reasonableness of rates may not be used as a means of obtaining delivery without payment. See 49 U.S.C. 10743(a) (except as provided by the ICC, a carrier "shall give up possession at destination of property transported by it only when payment for the transportation or service is provided"); *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 653 (1913) ("The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried * * * until the full legal rate has been paid."). Credit was not generally offered. See *Ex Parte No. 73: Rules and Regulations for Prompt Payment of Transportation Rates and Charges Prescribed*, 57 I.C.C. 591, 593, 596 (1920) ("'The majority of shippers or consignees in the past have paid their freight when they received their goods and that practice should be continued for the future.' * * * The rules and regulations which we promulgate should contemplate the collection of transportation charges prior to, or contemporaneous with, the delivery of most shipments.") (quoting United States Railroad Admin., Circular No. 9 (June 29, 1918)).



The Court's analysis in *Crancer* v. *Lowden*, *supra*, suggests that referral *is* permissible. There, the carrier sued to recover freight charges based on a tariff rate. The shipper claimed that a lower tariff rate applied, and that, if the higher tariff were applicable, it should be found unreasonable. This Court held that, in view of the ICC's finding in a prior case that the lower tariff did not apply to similar shipments, the district court correctly rejected the shipper's claim that the lower tariff was applicable. The Court also held that the district court did not abuse its discretion in refusing to stay its proceedings pending a second ICC proceeding where the shippers contended that, as applied to them, the tariff rate was unreasonable. 315 U.S. at 633, 635-636. The Court explained that:

> If the trial judge had, in the exercise of his discretion, continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the carrier to produce the witnesses who had made the inspection of the shipments. On the other hand, the petitioners suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If petitioners pay the judgment in this case, and the Commission should, in the still pending proceeding, decide to modify the tariffs, petitioners can obtain a complete remedy by way of reparation. * * * We hold that under the circumstances there was no abuse of discretion by the trial judge.

*Id.* at 636. *Crancer* does not state that the filed rate doctrine poses a rigid bar to a stay and referral; to the contrary, the Court ruled that there was "no abuse of

discretion" in the district court's determination to proceed in light of the balance of hardships faced by the parties in the circumstances of that case. The same approach, in the present context, strongly indicates that referral is the appropriate way to reconcile the parties' interests.

The bankrupt carriers and their collection agents do not face a risk of prejudice from referral to the ICC. Unlike in *Crancer*, there is no risk that delay might harm the carrier's ability to establish the claim; there is no dispute about the facts in the typical undercharge case filed by a bankrupt motor carrier's trustee. Here, for example, the relevant facts turn on the difference between the rates paid and the rates in the tariffs on file; those facts are undisputed. Pet. App. 28a, 60a.

On the other side of the ledger, the shippers sued by such carriers lack a "complete remedy" in reparations. *Crancer*, 315 U.S. at 636. Because the motor carrier is insolvent, it is unable to satisfy any subsequent reparations order. See *Delta Traffic Serv., Inc.* v. *Georgia-Pacific Corp.*, 936 F.2d at 66 ("[a] reparation order would be of little comfort to [the shipper], however, if [the carrier] was not in a position to comply with the order, and [the carrier's] status as a Chapter 11 debtor raises questions in this regard"); *Atlantis Express*, 955 F.2d at 537 ("Because [the shipper] was not billed for the undercharges until after [the carrier], a corporation, had liquidated, [the shipper] would have no remedy if it were unable to raise an unreasonableness defense."). In those circumstances, enforcement of the filed tariff without referral to the ICC would nullify the reasonableness requirement of the statute: it would undermine the ICC's exercise of its unreasonable-rate jurisdiction, recognized by this Court in *Maislin*, and deny the shipper an adequate remedy. Nothing in this Court's filed rate decisions compels that result.[16]

[16] *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), lends no support to the court of appeals' holding. In that case, the Court held that it was not permissible for a court to refer to the ICC the shipper's claim that a tariff rate was unreasonable, because the Act at that time provided no authority for the ICC to award reparations based on unreasonableness of past motor carrier rates. As Justice Stevens noted in his dissent in *Maislin*, the precedential value of *T.I.M.E.* was undercut by this Court's decision in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), and "what remained of it was soon thereafter unambiguously repudiated by Congress." 110 S. Ct. at 2776 n.12, citing Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 (codified at 49 U.S.C. 11705(b)(3), 11706(c)(2)) (creating express reparations remedy). "[W]hen Congress amended the [Act] to create such [a reparations] action, the basis for the *T.I.M.E.* holding was no longer valid." *Atlantis Express*, 955 F.2d at 537 n.15; *Transtop, Inc.*, 902 F.2d at 106 (same). Nor do *Mohasco Indus., Inc.* v. *Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir.), cert. denied, 419 U.S. 842 (1974), and *United States* v. *Associated Transp., Inc.*, 505 F.2d 366 (D.C. Cir. 1974), hold that the statute as amended bars referrals in the present context. Those cases merely distinguished between the administrative reparations remedy enacted to overrule the *T.I.M.E.* decision and the judge-made remedy of common law restitution. They have no relevance to the question here, which goes to the *timing* of the administrative remedy available to a shipper assessed with an unreasonable tariff rate.



3. The proper approach is to structure judicial review to achieve the purposes of the Act implicated by the particular collection proceeding. This Court has emphasized that judicial review of ICC determinations should be carried out in a fashion that preserves the ICC's primary jurisdiction over rates and protects parties unable to benefit from later reparation proceedings. *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982). In that case, the court of appeals, after vacating the last two of three successive ICC orders, concluded that its decision effectively "revived" the rate level established by the Commission's first order, and it required the carrier to collect that rate. This Court reversed, holding that the court's action had the impermissible effect of fixing a transportation rate. That action, the Court explained, undermined the ICC's "primary jurisdiction" to determine the reasonableness of rates and, moreover, failed to leave car-

riers "adequately protected" because the railroads could not seek reparations to recover losses if the rates the court established fell short of those ultimately found reasonable. *Ibid.*

Similarly, when the carrier is insolvent, a federal court order requiring immediate payment of the filed rate thwarts the Commission's ability to exercise its primary jurisdiction over rates and leaves shippers without a realistic opportunity for relief. That result is not required by the Act, and cannot be justified as an appropriate exercise of judicial discretion. It is the ICC that has "discretion to craft appropriate remedies for violations of the statute." *Maislin*, 110 S. Ct. at 2769; *ICC* v. *American Trucking Ass'ns, Inc.*, 467 U.S. 354, 364-365 (1984); *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 352 (1982). In the present category of cases, the Commission has determined that the proper remedy for unreasonableness violations is not to relegate the shipper to reparations proceedings, but to establish whether the rate is unreasonable *before* the bankrupt carrier collects it. See pp. 5-6, *supra*. By refusing to refer the issue of reasonableness to the ICC prior to collection of the filed rate, courts prevent the Commission from implementing its preferred remedial approach.

The court of appeals expressed the view that enforcement of the filed rate without referral to the ICC would merely place the shipper on the same plane as other shippers who had paid the full tariff rate in the first instance; that is, the shippers could seek reparations and then make a claim against the bankruptcy estate. Pet. App. 10a n.4. Neither the filed rate doctrine nor this Court's cases support that analysis.[17] A shipper's right to be free from unreasonable charges under a tariff does

[17] Nor do commercial practices in the motor carrier industry. In the highly competitive market that has prevailed in the last decade, shippers have not relied on reparations proceedings to contest tariffs thought to be too high; they have simply sought better rates from another carrier. As a result, rate-reasonableness cases are reaching the Commission today only in the context of undercharge claims by insolvent (or otherwise defunct) motor carriers.



not depend on whether (or how) other shippers have claimed that right.

Nor are the bankrupt carriers and their creditors entitled to the benefit of an illegal exaction under a tariff. If respondents had brought collection actions against other tradespersons not subject to ICC regulation, those defendants could plainly raise defenses such as illegality of the claim; it would be fundamentally unfair to allow prosecution of the claim, but to bar assertion of the defense. That equitable principle applies with even greater force here. Respondents' claim for recovery rests solely on the filed rate requirement of the Interstate Commerce Act. Respondents should not be allowed to invoke one provision of the Act while frustrating application of another—thus subordinating the requirement that rates must be reasonable and otherwise lawful to their creditors' interest in obtaining funds.

### C. The Claim Of Rate Unreasonableness In This Case, If Appropriately Supported, Should Be Referred To The Commission

The court of appeals held that it was precluded by the filed rate doctrine from referring the claim of rate-unreasonableness to the Commission. That holding is erroneous. When the party seeking to enforce the filed rate is in bankruptcy, there is little, if any, prospect that a shipper that prevails in an unreasonableness claim could be made whole through reparations proceedings. In that context, nothing in the Act forecloses the court from staying its proceedings and referring the issue of reasonableness to the ICC. Indeed, when the carrier's trustee brings suit more than two years after the traffic moved, thus foreclosing the shipper's resort to reparations proceedings by virtue of the running of the statute of limitations, it is also the case that reparations are inadequate, and referral to the ICC is appropriate. 49 U.S.C. 11706(c)(2) (two-year statute of limitations governing shipper's reparations remedy); *United States* v. *Western Pacific R.R.*, 352 U.S. at 70-74 (referral required when collection action commenced following running of statute of

limitations on reparations claim); *Duffy* v. *BMC Indus., Inc.*, 938 F.2d at 357 (same); see Pet. App. 94a, 97a (some CCE shipments involved in this case moved in December 1983); J.A. 14-18 (complaint against CCE filed December 18, 1986).

The remaining issue is whether petitioners made an appropriate threshold showing that the tariff rates are unreasonable, thus warranting a referral of the issue to the Commission. A substantial difference between the negotiated rates billed and the tariff rates, or between the tariff rates and the rates available from other carriers, is prima facie evidence that the tariff rates are unreasonable. Similarly, a tariff rate under which the traffic would not have moved is prima facie unreasonable. See note 5, *supra* (summarizing factors traditionally considered by the Commission in evaluating unreasonableness claims). Because the courts below, however, have not considered whether petitioners made a sufficient preliminary showing, the case should be remanded for further proceedings on that issue.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

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